LIBRARY
SUPREME COURT, U. S.

Nos. 987 and 1026

Office-Supreme Court, U.S.
FILED
MAY 22 1964
JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
October Term, 1963

PRADO OIL AND GAS COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, *Respondents*.

SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, SUNRAY DX OIL COMPANY, GEORGE H. COATES, *Petitioners*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, *Respondents*.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

KENT H. BROWN, *Counsel*
55 Elk Street
Albany, New York

MORTON L. SIMONS
1815 H Street, N. W.
Washington, D. C.

Attorneys for Respondent

May 22, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	2
Questions Presented	2
Statement of the Case	2
Argument	7
I. No certiorari issue is presented by Prado's contention that, as a matter of law, the Commission is required to consider cost data in a Section 7 certificate proceeding	7
II. The nature of the Commission's responsibility to require refunds of excess amounts collected under temporary certificates raises a certiorari question, though not in the precise form presented by petitioners	10
Conclusion	15

TABLE OF AUTHORITIES

COURT CASES:

Algonquin Gas Transmission Co. v. *F.P.C.*, 201 F.2d 334 (1st Cir. 1953)	11
Atlantic Refining Co. v. *F.P.C.*, 316 F.2d 677 (D.C. Cir. 1963)	8, 9
Atlantic Refining Co. v. *Public Service Commission of New York (Catco)*, 360 U.S. 378 (1959)	5, 7, 8, 9, 10, 11, 12
California Oil Co. v. *F.P.C.*, 315 F.2d 652 (10th Cir. 1963)	9
N.L.R.B. v. *Fruit and Vegetable Packers*, — U.S. —, 84 S.Ct. 1063 (1964), *reversing Fruit and Vegetable Packers* v. *N.L.R.B.*, 308 F.2d 311 (D.C. Cir. 1962)	14
Oklahoma Natural Gas Co. v. *F.P.C.*, 257 F.2d 634 (D.C. Cir. 1958), *cert. granted*, 358 U.S. 877, *cert. dismissed*, 358 U.S. 948	9
Public Service Commission of New York v. *F.P.C.*, 361 U.S. 195 (1959)	10

Page

Public Service Commission of New York v. *F.P.C.*, 295 F.2d 140 (D.C. Cir. 1961), *cert. denied sub nom. Shell Oil Co.* v. *Public Service Commission of New York*, 368 U.S. 948 5
Public Service Commission of New York v. *F.P.C.*, 327 F.2d 893 (D.C. Cir. 1964) 12
Texaco Inc. v. *F.P.C.*, 290 F.2d 149 (5th Cir. 1961) 9, 13
U.S. v. *El Paso Natural Gas Co.*, — U.S. —, 84 S.Ct. 1044 (1964) 14

FPC Cases:

Amerada Petroleum Corp., Op. 422 (March 23, 1964) .. 14
Continental Oil Co., 27 FPC 96 (1962) 11
Socony Mobil Oil Co., 27 FPC 347 (1962) 11
Texaco-Seaboard Inc., 27 FPC 15 (1962) 11

Statutes and Regulations:

Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w, Section 7, 15 U.S.C. § 717f 2, 3, 10
Regulations under the Natural Gas Act, 18 C.F.R., Chapter 1, Section 157.28 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 987 and 1026

PRADO OIL AND GAS COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, *Respondents*.

SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, SUNRAY DX OIL COMPANY, GEORGE H. COATES, *Petitioners*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, *Respondents*.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

OPINION BELOW

The opinion of the Court of Appeals is reported at 329 F.2d 242.

QUESTIONS PRESENTED

1. Whether, in a certificate proceeding under Section 7 of the Natural Gas Act, the Federal Power Commission is required as a matter of law to consider evidence of the certificate applicant's costs as a prerequisite to issuing a certificate and imposing a condition therein limiting the initial price to the in-line level.

2. Whether, in issuing a certificate following the statutorily required hearing, the Federal Power Commission has the power *and* the duty to require the applicant to refund amounts collected under an *ex parte*, pre-hearing temporary certificate to the extent such amounts are in excess of the maximum initial price found by the Commission to be required by the public convenience and necessity.

STATEMENT OF THE CASE

In 1959 and 1960, each of the five petitioners contracted to sell natural gas produced in Texas Railroad Commission District No. 4 to South Texas Natural Gas Gathering Company at an initial price of 16¢ per Mcf; these contracts were part of a larger project involving the purchase by South Texas Natural of substantial volumes of natural gas in District 4 for delivery to Transcontinental Gas Pipe Line Corporation, a major interstate gas transmission company whose principal markets are the Philadelphia-New York City metropolitan areas. Applications for certificates of public convenience and necessity for these sales were first filed

by the petitioning producers between May 1959 and January 1960.[1] Even before notice of these applications had been issued, however, the producers requested, and the Commission granted, *ex parte* temporary certificates at the contract price of 16¢ per Mcf.[2] Although the principal issue presented by these applications was whether the 16¢ level was in line—and all parties to the present appeal now concede that it was not—the Commission in permitting the sales to commence under the temporary certificates did not include as part of its authorization an express condition advising the producers that if after formal hearing the 16¢ price should be found to be out of line, the producers would be expected to refund the excess amounts collected under the temporary certificates. The certificates did contain language, however, advising the producers that the authority thus granted was "without prejudice to any findings or orders which may be made in the final

---

[1] Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), provides that no person shall commence a sale of natural gas for resale in interstate commerce "unless there is in force with respect to such [person] a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." The section further provides that such certificate shall be issued only after notice and hearing.

[2] A proviso to Section 7(c) empowers the Commission to

> "issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate . . . ."

The "emergency" alleged by the producers here (see Pet. No. 1026, p. 4) was, in essence, the loss of revenue to them during the time it would take the Commission to act on their certificate applications.

disposition of this proceeding" [3] Because of the private, almost secret nature of temporary certificates—they are granted on *ex parte* request without notice or hearing, they are issued by letter to the applicant rather than by formal order, and they are normally issued prior to the time notice has been given of the underlying certificate application—respondent Public Service Commission of the State of New York was not aware of the existence of these temporary certificates until months and even years after their issuance. During the entire period under discussion, however, respondent Federal Power Commission and petitioning producers were well aware that respondent New York Commission had consistently and publicly maintained that the in-

---

[3] The "without prejudice" provision was found not once but twice in each of the temporary certificates:

> "This acceptance for filing shall not be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.
>
> * * * *
>
> "This constitutes all requisite temporary authorization to commence the sale of gas, but such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate application as the record may require and, furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act."

line price in Texas District 4 was 14.6¢ per Mcf and had consistently and publicly sought a hearing on its contention.[4]

The Commission proceedings below finally afforded that hearing, and the Commission's decision was the first in which it determined an in-line price, conformably with *Atlantic Refining Co.* v. *Public Service Commission of New York* (*Catco*), 360 U.S. 378 (1959), for Texas Railroad District 4; it was also the first decision in which the Commission passed squarely on whether producer applicants should, on permanent certification, be required to refund excess amounts collected under temporary certificates lacking an "express" refund condition. We adopt here the Court of Appeals' summary of the Commission's action (329 F.2d at 244):

> "On August 30, 1962, the Commission issued its own final decision in which it found that the 'in-line' price for the area with respect to contracts entered into prior to September 28, 1960, was 15 cents per Mcf. Accordingly, it approved the sales in question on the condition that the price charged be not in excess of 15 cents. It refused, however, to order a refund of the charges in excess of 15 cents collected under the temporary authorizations. The Commission was initially of the opinion that since no refund provision had been included in the temporary certificates there was 'no basis for ordering refunds.' In its later order of December 18, 1962, denying reconsideration, the Commission explained that it would be inequitable to require refunds when the temporary certificates contained no provision clearly apprising the producers of the

---

[4] See, *e.g.*, *Public Service Commission of New York* v. *F.P.C.*, 295 F.2d 140 (D.C. Cir. 1961), *cert denied sub nom. Shell Oil Co.* v. *Public Service Commission of New York*, 368 U.S. 948.

risk in operating under a temporary certificate subject to a refund obligation." (Footnotes omitted.)

Cross-appeals to the District of Columbia Circuit followed: The Public Service Commission of the State of New York, The United Gas Improvement Company, and Long Island Lighting Company (D.C. Cir. Nos. 17582 and 17628) challenged the Commission's failure to require refunds of the excess amounts; while Continental Oil Company, Sunray DX Oil Company, and Prado Oil and Gas Company (D.C. Cir. Nos. 17627 and 17859) challenged the Commission's finding that the in-line level was 15¢ per Mcf.

Writing for a unanimous panel, Judge Fahy rejected the producer contention that 15¢ was not the proper in-line figure, but sustained the consumer contention that the Commission erred in holding that the absence of an express refund condition in the temporary certificate provided a basis—either legal or equitable—for permitting the producers to retain the excess amounts previously collected.

Only Prado, petitioner in No. 987, challenges the Court of Appeals' decision on the in-line finding, and that challenge is limited to the single contention that in determining the in-line price, the Commission should have considered the cost data presented by certain of the producer applicants. This issue was one of several decided by the court below in the Prado-Continental dockets, in which the New York Commission was an intervenor in opposition.

Both Prado and the petitioners in No. 1026 challenge the Court of Appeals' decision on the refund issue. This issue was decided by the court below in the New

York Commission-United Gas Improvement dockets, in which the Federal Power Commission was respondent and the petitioners in this Court were intervenors in support of the Commission's decision.

In their petitions for certiorari the petitioning producers have properly named the New York Commission, The United Gas Improvement Company, and Long Island Lighting Company as respondents; however, with respect to the refund issue—the sole issue raised by petitioners in No. 1026—it is clear that the FPC has at no time during this litigation been aligned with the New York Commission *et al.*, but has, to the contrary, been aligned with the producers. Accordingly, the Commission should be treated as an intervenor-petitioner rather than as a respondent.

ARGUMENT

I. No certiorari issue is presented by Prado's contention that, as a matter of law, the Commission is required to consider cost data in a Section 7 certificate proceeding.

Prado suggests two reasons (Pet., pp. 10-12) for review by this Court of its contention that the Commission is required as a matter of law to consider cost data in a Section 7 certificate proceeding. First, it states—quite incorrectly—that the decision of the court below is inconsistent with this Court's decision in *Cities Service Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959). Second, it asserts that there is a need for "clarification" of the evidentiary standards which the Commission should be required to apply in Section 7 certificate proceedings. We would note at the very outset that, far from being inconsistent with *Cities Service*, the decision of the court below is required by *Cities Service*, and that, even assuming it to be this Court's

function to "clarify" evidentiary standards where there is no claim of conflict among the circuits or of gross error, the evidentiary standards have been made abundantly clear by prior decisions.

The problem in *Cateo* was that the Commission had unconditionally certificated an out-of-line price without any evidence that such price was just and reasonable. The Commission defended its action on the ground that it was impractical to determine the just and reasonable rate in a certificate case and that the out-of-line price it had unconditionally certificated could be tested in a subsequent rate investigation under Section 5 of the Act and could be reduced if found excessive. This Court found the Commission's reasoning unpersuasive, since unconditional certification of an out-of-line price would permit the producer to collect and retain that price, without any possibility of refund even should the price prove to be excessive, during the long period between certification and the ultimate conclusion of a Section 5 investigation. The Court very specifically held that the Commission was not required to determine justness and reasonableness in the certificate proceeding, and that the Commission's responsibility to protect the consumer could be adequately discharged through the use of conditions to hold the line, 360 U.S. at 390-92.[5]

Thus, where a proposed initial price is out of line, the Commission has two alternatives—it may make an investigation of the justness and reasonableness of the rate and issue a certificate at the just and reasonable

[5] These conditions were necessary, as Judge J. Skelly Wright pointed out in a subsequent *Atlantic Refining* case, because "the public must be protected from the time the gas first enters interstate commerce." *Atlantic Refining Co.* v. *F.P.C.*, 316 F.2d 677 at 679 (D.C. Cir. 1963).

level, or it may impose a rate condition designed to hold the line and protect the public during the period in which the propriety of the initial rate is being tested.[6] Accordingly, where the Commission has actually certificated an out-of-line price, its action can be sustained only if it has made the requisite findings of justness and reasonableness; and it was for this reason that the Court in *Catco* searched the record for supporting cost data, see 360 U.S. at 392-93. Prado thus obviously errs when it relies on the language found in this section of the Court's opinion to support its thesis that cost data must be received and utilized by the Commission in a certificate case.

Not only is *Catco* clear and unambiguous in holding that cost data need not be received in a certificate case, but the subsequent court of appeals decisions, even prior to the decision of the court below, have consistently and expressly ruled, as did the court below, that

> "the standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of *Catco* to avoid the consequences of the well nigh interminable proceedings incident to a rate case would be defeated." 329 F.2d at 246-47.

See, for example, *Atlantic Refining Co.* v. *F.P.C.*, 316 F.2d 677 at 680 (D.C. Cir. 1963); *California Oil Co.* v. *F.P.C.*, 315 F.2d 652 at 655-657, 659 (10th Cir. 1963); *Texaco Inc.* v. *F.P.C.*, 290 F.2d 149 at 155, 157 (5th Cir. 1961).

---

[6] See the opinion of Judge Bazelon in *Oklahoma Natural Gas Co.* v. *F.P.C.*, 257 F.2d 634 at 652-53 (D.C. Cir. 1958) (dissenting opinion); *cert. granted*, 358 U.S. 877, cert. dismissed on petitioner's allegation of mootness, 358 U.S. 948.

II. The nature of the Commission's responsibility to require refunds of excess amounts collected under temporary certificates raises a certiorari question, though not in the precise form presented by petitioners.

In the earlier initial price cases before this Court, no question of temporary certificates was involved, *Catco, supra; Public Service Commission of New York* v. *F.P.C.*, 361 U.S. 195 (1959). Then, at about the time those cases were pending on review, the Commission began an extensive, but unpublicized, program[7] of issuing temporary certificates, pursuant to its "emergency" powers as defined by Section 157.28 of its Regulations, in situations involving economic detriment to the applicant.[8] These certificates were issued virtually in the dark of night—*ex parte*, without notice or hearing, prior to the time notice was given of the underlying application, via private letter rather than by public order. In some cases the certificates contained an express refund condition, in other cases they did not, and in many cases where refund conditions were originally imposed they were deleted by the same private *ex parte* procedures, with no notice given to consumer interests, such as respondent, which had been publicly, consistently, and, as the result of this Court's *Catco* decision, effectively contending against unconditioned certification of out-of-line initial prices.

By the time respondent, and other consumer interests, became aware of the Commission's policy, there were

---

[7] Although the existence of the program was carefully shielded from public view, it appears to have become well-known to the producing industry.

[8] This Regulation was purportedly adopted pursuant to the proviso to Section 7(c), (see note 2, *supra*), which grants the Commission power to issue temporary certificates "in cases of emergency."

thousands of these temporaries outstanding, with new ones being issued at the rate of over one hundred a month. While the Commission's discretion to broaden its "emergency" power to encompass virtually every certificate application seemed of dubious legality, see *Algonquin Gas Transmission Co.* v. *F.P.C.*, 201 F.2d 334 (1st Cir. 1953), the New York Commission felt that so long as the FPC on granting permanent certification (which required a hearing in which the price required by the public convenience and necessity would be determined) ordered the applicant to disgorge the excess amounts collected under the temporary certificate, there would in end result be no injury to the consumer, within the meaning of *Catco*.

At first, the Commission seemed disposed and prepared, in granting permanent certification, to correct any errors that would result from producer retention of excess amounts collected under temporary certificates by requiring the producer to refund all amounts in excess of the in-line price, as determined at a public hearing where both producer and consumer interests were represented; the Commission stated that, by its very nature, a temporary certificate, even where unconditioned, conferred no "unalterable" rights, but rather contemplated "a continuous course of adjustment until the time that a final order determines the conditions under which a permanent certificate shall be issued." *Continental Oil Co.*, 27 FPC 96 at 110 (1962); and see *Socony Mobil Oil Co.*, 27 FPC 347 (1962), and *Texaco-Seaboard Inc.*, 27 FPC 15 (1962).

Then, in August 1962, in its *Skelly* decision (the subject of the review proceedings below), the Commission for the first time ruled that producers would be permitted to retain out-of-line prices collected pursuant

to their *ex parte* temporary certificates in every case where the temporary did not contain an "express" refund condition.

Because this ruling meant that, contrary to the intent of *Catco*, the consumer would have no protection from excess rates and charges during the "nigh interminable" period between temporary and permanent certification —for not only are temporary certificates issued by the thousands but they frequently remain in effect for as long as four and five years — respondent New York Commission took action on two fronts: (1) It took a direct appeal from the Commission's *Skelly* opinion, urging that notwithstanding the absence of an express refund condition, the Commission was required as a matter of law to order refunds of excess amounts collected under temporary certificates; and (2) it appealed from the Commission's issuance of three temporary certificates permitting collection of out-of-line prices with no express refund condition, contending, *inter alia*, that the Commission's emergency power to issue temporary certificates under the proviso to Section 7(c) applied only to cases of emergent public need and not to cases involving only economic detriment to the applicant, and that, in any event, the certificates were invalid, within the meaning of *Catco*, because of the combination of an out-of-line price and the absence of an express refund condition. The two appeals were heard ten days apart by the same panel of the District of Columbia Circuit, but the second appeal, *Public Service Commission of New York* v. *F.P.C.*, 327 F.2d 893, was decided first, on January 2, 1964. In that decision, the court sustained the Commission's power to issue temporary certificates to prevent economic detriment to the applicant, but ruled that the absence of an express

refund condition in the temporary certificate did not foreclose the question of refunds on permanent certification. Three weeks later, in the decision which is the subject of the instant petitions for certiorari, *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242, the court reaffirmed the position it had taken in its companion January 2 decision by holding that the consumer interests were aggrieved by the lack of a refund requirement in the *permanent* certificate rather than by the lack of a refund condition in the *temporary* certificate, 329 F.2d at 248, and that the absence of a refund condition in the temporary certificate did not furnish any basis for permitting the producer to retain past excesses, 329 F.2d at 249-50.

Although the court refused, in terms, to hold, as requested by the New York Commission, that refund of excess amounts was required as a matter of law ("The existence of the power [to order refunds] does not mean that its exercise is mandatory, as petitioners . . . assert," 329 F.2d at 250), the *practical* effect of its decision is that refunds are mandatory. This is so because, while holding that the ordering of refunds must turn on "equitable considerations," the court expressly rejected as a decisive factor in such evaluation the only "equitable consideration" advanced to justify retention of the excessive prices—the absence of an express refund condition.[9] For this reason, the case should have been

---

[9] Where the temporary certificate contains an express refund condition, the Commission has, without exception, required refund of the excess amounts collected, see, *e.g.*, *Texaco Inc.* v. *F.P.C.*, 290 F.2d 149 (5th Cir. 1961), and it is unchallenged here that had the temporaries contained an express refund condition (all other considerations remaining the same), the Commission would have ordered refunds.

remanded with directions that the Commission order refunds of excess amounts rather than for further proceedings to consider the "equitable considerations." See *N.L.R.B.* v. *Fruit and Vegetable Packers*, — U.S. —, 84 S.Ct. 1063 at 1066, 1071 (1964), reversing *Fruit and Vegetable Packers* v. *N.L.R.B.*, 308 F.2d 311 (D.C. Cir. 1962); see also *U.S.* v. *El Paso Natural Gas Co.*, — U.S. —, 84 S.Ct. 1044 at 1050 (1964).

Thus, even though the practical effect and ultimate meaning of the Court of Appeals' decision is to require refunds of excess amounts, the remand fashioned by the court below has serious shortcomings. By calling for still further proceedings where there are no new pertinent facts which could possibly affect the outcome, the remand unduly and unnecessarily delays justice. Moreover, there exists a danger, as demonstrated by the past history in this initial price field, that a general mandate may be mistakenly interpreted as no mandate at all. That this is a very real and present danger is indicated by the Commission's most recent decision on the initial price-refund problem—*Amerada Petroleum Corp.*, Opinion No. 422, issued March 23, 1964 (two months *after* the decision of the court below)—where the Commission once again declined to order refunds of excess amounts collected under temporary certificates containing no "express" refund condition.

Under such circumstances, we believe it both appropriate and desirable for the Court to grant the writ of certiorari on the refund issue.

CONCLUSION

For the foregoing reasons, respondent Public Service Commission of the State of New York

(1) opposes certiorari on the second question presented by petitioner in No. 987;

(2) does not oppose certiorari on the first question presented by petitioner in No. 987 and the single question presented by petitioners in No. 1026, provided the question is phrased as follows:

> Whether, in issuing a certificate following the statutorily required hearing, the Federal Power Commission has the power *and* the duty to require the applicant to refund amounts collected under an *ex parte*, pre-hearing, temporary certificate to the extent such amounts are in excess of the maximum initial price found by the Commission to be required by the public convenience and necessity.

In the event the writ is granted, respondent respectfully requests that the Federal Power Commission, named by petitioners as a respondent, be designated an intervenor-petitioner.

Respectfully submitted,

KENT H. BROWN, *Counsel*
55 Elk Street
Albany, New York

MORTON L. SIMONS
1815 H Street, N. W.
Washington, D. C.

Attorneys for Respondent

May 22, 1964.